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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1939

No. 129

GENERAL AMERICAN TANK CAR CORPORATION
(a corporation),
Petitioner,

vs.

EL DORADO TERMINAL COMPANY
(a corporation),
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF FACTS INVOLVED.

Petitioner's statement of the matter involved and the argument advanced in support of the petition for writ of certiorari proceed upon the theory that the payment by petitioner to the respondent, in accordance with the contract whereby respondent leased certain tank cars, would result in a rebate and discrimination prohibited by the provisions of the Elkins Act. The following facts were either stipulated or

proven without conflict and are not the subject of controversy:*

The El Dorado Company is a manufacturer of coconut oil with a plant located on San Francisco Bay. (R. 30.) The car corporation is a company not engaged in transportation, and is the owner of tank cars leased or rented by it to commodity shippers. (R. 30.) For the movement of its vegetable oil El Dorado Company required steel tank cars fitted with heating coils. (R. 169.) In 1933, and for many years prior thereto and since, the published and filed tariffs of all railroad carriers provided that the railroads would not furnish these tank cars for transportation purposes (R. 163, 167, 201), but would allow and pay for the furnishing thereof a mileage allowance of 1½¢ per mile "to the car owner or to the party who has acquired the car or cars". (R. 192-197.)

On September 28, 1933, El Dorado Company entered into an agreement of lease with the car corporation whereby there were leased to the oil works for a period of three years fifty tank cars of a specified capacity, equipped with heating coils and otherwise suitable for the transportation of vegetable oils. (R. 30, 20-28.) The oil works undertook to pay a monthly cash rental for these cars and in return therefor was given the exclusive possession and the right to use said cars. (R. 20 et seq.) In the lease agreement the car corporation undertook to collect from the railroad

*For convenience and in conformance with the petition we will refer to the petitioner as the "car corporation" and the El Dorado Oil Works and its wholly owned subsidiary the respondent as the "El Dorado Company".

carriers the said mileage allowances for the benefit of its lessee the El Dorado Company. (R. 26.) The El Dorado Company fully performed under the said agreement, and the car corporation fully performed under said agreement up to June, 1935, and during that time collected the mileage allowances stipulated in the published tariffs and paid them over to the El Dorado Company monthly. (R. 32.) Thereafter the car corporation refused to make payments in excess of the amount becoming due to it for the car rentals, notwithstanding that it continued to collect the said mileage allowances in full from the railroad carriers. (R. 33-34; Petition, p. 6.)

The El Dorado Company instituted this action to collect the moneys so withheld by the car corporation. (Petition, p. 7.) It was stipulated at the trial that the amount so collected and withheld by the car corporation up to the filing of this action was $18,532.78. (R. 45, 46.)

In its answer to the complaint the car corporation admitted the lease agreement and its validity, but denied liability upon the sole ground that the payment of said mileage allowances to El Dorado Company was expressly prohibited and enjoined by the provisions of the Elkins Act; and that if the car corporation were to make any such payments in excess of the "car hire or rental" reserved in the lease, said payments would be unlawful in that El Dorado Company would secure transportation of property at rates less than those named in the published and filed tariffs of the common carriers, and that a rebate, concession

or discrimination prohibited by the Elkins Act would result. (R. 17, 18.)

The car corporation did not, in its answer or during the trial, question the legality of the said mileage allowances provided for in the published tariffs. Nor did it question *its* right to receive the same from the carriers. It was not disputed that the various railroad carriers over whose lines the said tank cars moved in the transportation of the El Dorado Company's coconut oil, received the full freight rates named in the tariffs published and filed by such carriers. (R. 169.) It was also admitted that the mileage allowances paid by the said carriers to the car corporation as the owner of the said cars were only and exactly those provided by the said published tariffs to be so paid. (R. 174.)

Petitioner did not plead, nor has it in any manner or at any time claimed, nor does it now claim, that the lease agreement was a cloak to cover any plan or scheme to accomplish a secret rebate or discrimination, or to evade the prohibitions of the Elkins Act. Without the concurrence or knowledge of the carriers the car corporation leased the tank cars to the El Dorado Company for its exclusive use in the transportation of its coconut oil.

Therefore, the only issue tendered by petitioner's answer in the District Court, and the only question for determination, was whether the car corporation should continue its payments to the El Dorado Company in accordance with its agreement of lease, of the mileage so collected, or whether it could retain the

sums so collected to the extent that they exceeded the cash rentals payable by the El Dorado Company as the lessee of the cars—on the ground as pleaded that such payments were prohibited by the Elkins Act.

ARGUMENT IN SUPPORT OF DECISION OF CIRCUIT COURT OF APPEALS.

In the District Court and again in the Circuit Court of Appeals respondent took the position that the agreement of lease of the tank cars was admittedly valid; that the moneys agreed to be paid by the car corporation to respondent were only those which were properly receivable from the carriers in accordance with their published tariffs and mileage allowances; that as to the cars involved in every instance the full commodity freight rate provided to be paid according to the applicable freight tariffs was paid by the consignee or purchaser of the coconut oil, and that the only mileage allowances made by the carriers were those strictly provided for in the published tariffs and available to all shippers furnishing tank cars to railroads.

No person or corporation in any manner *engaged in transportation* was directly or indirectly a party to or concerned with the said agreement of lease.

U. S. v. Peterson (D. C. Mont. 1924), 1 Fed. (2d) 1018.

On these bases there could be no violation of the provisions of the Elkins Act because there was no carriage of commodities at less than the full published

freight rates applicable thereto; the payment of mileage allowances were not rebate or concession because it was specifically provided for in the mileage tariffs as published and filed.

U. S. v. Durkee Famous Foods Inc. (D. C. N. J. 1937), 17 Fed. Sup. 846.

The Interstate Commerce Commission, though authorized to do so had never questioned the propriety of those allowances as applied to tank cars though they had been in effect for many years. Accordingly railroad carriers as well as shippers were bound to conform therewith. In these circumstances the $18,532.78 which is the subject of the present suit was lawfully paid by the carriers to the car corporation. Since the money was legally received by the car corporation it was obligated, according to the terms of its agreement of lease, to pay the same over to the El Dorado Company as provided in said agreement of lease.

The Circuit Court of Appeals sustained all of the said contentions of the respondent, and in addition held (R. 308 et seq.) that the El Dorado Company and not the corporation was, by reason of the lease above mentioned, the exclusive supplier of the tank cars for transportation purposes; also that if there was merit in the argument of the car corporation that moneys received by the supplier of tank cars in excess of the monthly cash rental paid by the supplier to the car corporation for those cars constituted a "profit", the car corporation had not tendered that issue and had failed entirely to prove that the El

Dorado Company's total cost of supplying the cars to the railroads was less than the mileage earnings allowed under the tariffs.

Inasmuch as the decision of the Circuit Court of Appeals that there was no violation of the prohibitions of the Elkins Act, because the full published tariff rates were paid and the mileage allowances paid to the car corporation were only those definitively provided for in the mileage tariffs, was strictly according to the facts and amply supported by authority, the question as to the cost to the El Dorado Company of supplying the tank cars for transportation purposes, where the railroad carriers did not and could not furnish such cars, is of secondary importance. In the absence of any question by the Interstate Commerce Commission, a shipper or a carrier, as to the reasonableness of such mileage allowances, they must be accepted as reasonable and by virtue of their publication they are lawful and binding. (49 U. S. C. A. Sec. 41 (1) and (2).)

ANSWER TO ARGUMENTS OF PETITIONER SUPPORTING PETITION FOR WRIT OF CERTIORARI.

I.

PETITIONER IS NOT PROHIBITED BY LAW, INCLUDING THE ELKINS ACT, FROM PAYING TO RESPONDENT ANY MILEAGE EARNINGS WHICH ARE THE SUBJECT OF THIS SUIT.

For the purpose of pointing out the distinction between the situation here involved and the situation in the cases claimed by petitioner to govern this case, we wish to emphasize certain facts as shown by the record.

A. The important facts.

Respondent El Dorado Company was not only a shipper of commodities over the lines of rail carriers from San Francisco Bay to points in the East, but also it was a supplier of a particular type of tank cars to the railroads for the purpose of said shipments. (R. 31-32, 169.) Respondent did not own its own tank cars, but obtained them by lease from petitioner car corporation under a contract set forth in petitioner's answer in the District Court. (R. 30.) This contract set forth certain of the obligations and costs imposed upon El Dorado Company respecting these tank cars. (R. 23 et seq.) Of course, as a supplier of transportation facilities to the railroads, respondent El Dorado Company was entitled to compensation for furnishing these tank cars to the railroad.

U. S. v. Baltimore & Ohio Railroad (1913), 231 U. S. 274, 58 L. Ed. 218;

Interstate Commerce Commission v. Diffenbaugh (1911), 222 U. S. 42, 56 L. Ed. 83;

Union Pacific v. Updike Grain Company (1911), 222 U. S. 215, 56 L. Ed. 171;

American Trucking Assns. Inc. v. U. S. et al. (D. C. Dist. of Col. 1936), 17 Fed. Sup. 655;

49 *U. S. C. A.* Sec. 1 (14);

49 *U. S. C. A.* Sec. 15 (13).

The contract with the car corporation provided for the collection of this compensation by the car corporation, for the crediting of all amounts collected against rentals, and for the monthly remission of the excess, if any, by the car corporation to the El Dorado Com-

pany. (R. 32.) The car corporation did not supply any facilities to the railroad nor did it have any relationship with the railroad. (R. 30, 34.) The railroads serving San Francisco Bay did not offer to, and did not actually furnish shippers of coconut oil the type of tank cars necessary for such shipments. (R. 163-172.) El Dorado Company and also other manufacturers of vegetable oils were forced to obtain tank cars from other sources and to furnish those tank cars to the railroad for shipping their own commodities. (R. 163-176.) The car corporation leased many other tank cars to other shippers of vegetable oils on the Pacific Coast. (R. 175-176.)

Except for the contract between the El Dorado Company and the car corporation there is nothing in the record to show that the railroads would not make payment of the compensation for furnishing tank cars directly to the respondent El Dorado Company. There is nothing to show that the Interstate Commerce Commission ever held the *amount* of compensation to be unreasonable, or ever held that such compensation could not be paid directly to the shipper-supplier, or could not be paid to the shipper-supplier through the car owner who leased the cars to the shipper-supplier. Neither the Interstate Commerce Commission, nor any railroad, nor any shipper or other party was a party to the suit in the District Court between El Dorado Company and the car corporation.

B. Cases relied on by petitioner as conflicting with decision of Circuit Court of Appeals.

In its brief petitioner relies heavily upon three cases as being in conflict with the decision of the Circuit Court of Appeals, to-wit, *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, *Interstate Commerce Commission v. Reichman*, 145 Fed. 235 (C. C. N. D., Ill. 1906), and *Spencer Kellogg & Sons v. U. S.*, 20 Fed. (2d) 459 (C. C. A. (2d) 1937), cert. den. 275 U. S. 506. All these three cases are easily distinguishable from the situation here.

The petitioner quotes extensively from the report of the Interstate Commerce Commission in the *Refrigerator Car Case*, "Investigation and Suspension Docket No. 3887, Use of Privately Owned Refrigerator Cars" (201 I. C. C. 323). The report of this decision is set out in full in the record. (R. 49-182.) In its said report the Commission developed the abuses resulting from the extensive use by shippers of privately owned refrigerator cars in competition with similar types of cars owned by the carriers and available for use by shippers. The Commission asserts with perfect propriety that the carriers suffer to the extent that they have paid mileage to shippers who furnished refrigerator cars instead of using the available refrigerator cars of the carriers. The question considered and decided was as to the reasonableness of the allowances so paid on refrigerator cars and the ruling of the Commission against the allowances was expressly limited to refrigerator cars and the findings were so restricted. (R. 159.) The Commission did declare, however, that the carriers do not hold them-

selves out to furnish *tank cars* distinguished from *refrigerator* cars to shippers, nor do they own or lease sufficient cars to do so. (R. 138.) Furthermore the Commission stated that the evidence before it was not comprehensive enough to warrant any conclusion as to the use of private tank cars. (R. 139.) In fact the proceeding involving all cars other than refrigerator cars was ordered dismissed. (R. 159-162.) With reference to the use of private refrigerator cars which directly competed with such cars owned by the carriers, the Commission's argument is not apposite to the use of tank cars where the railroads assume no responsibility to furnish them, do not furnish them, and have not sufficient cars to meet the requirements of shippers.

That the Commission did not feel called upon to question in any manner the allowances payable under the mileage tariffs for the use of tank cars is made clear not only by the fact that the Commission limited its order to refrigerator cars and dismissed the proceeding as to tank cars for want of evidence, but that it has never since questioned the reasonableness of the allowances paid for the furnishing of tank cars according to the published and filed railroad tariffs.

It is true that the Commission further stated, in the refrigerator car case, as quoted by petitioner (Petition p. 5) that certain shippers enjoyed benefits not available to all shippers in the particular circumstances attending the use by certain shippers of refrigerator cars privately owned instead of those belonging to the railroad carriers. However, the record before this

Court in this case is noteworthy in that there is not a scintilla of evidence that other shippers were not in exactly the same position as the El Dorado Company. On the contrary it is uncontradicted that the railroads *could not* and *did not* furnish the *necessary type of tank cars* to all shippers of vegetable oils, and that *all such shippers* had to obtain their cars from other than railroad sources. (R. 163-170.) Furthermore the car corporation admittedly had numerous tank cars leased out to other shippers of vegetable oils throughout the whole Pacific Coast. (R. 173.) There is nothing to show that the mileage tariffs did not apply to the mileage earned by the tank cars furnished by all such shippers nor that all such shippers did not have contracts with car companies similar to the one sued upon in this case. Every element condemned or criticized in the refrigerator car proceeding is therefore wanting in this case, and moreover as shown by the undisputed evidence, the full tariff freight rates were paid to the railroads by the consignees of all the coconut oil shipped by respondent in its leased tank cars.

In the last paragraph of page 5 of its brief petitioner quotes a statement of the Commission in the refrigerator car proceeding condemning payment to certain shippers for the use of refrigerator cars and other actual expenses in connection therewith. Apart from the many other distinctions between the situation inquired into by the Commission and the situation involved in this suit, the Commission specifically alludes to the fact that the shippers in question were

receiving as compensation substantially more than the rental and other expenses. But in our case petitioner herein has always claimed that the mere excess over *rentals*, regardless of the possibility of other expenses, constitutes a "profit" which in turn constitutes a rebate. The Commission's report shows that there was no evidence before the Commission pertaining to expenses and costs in connection with private tank cars. The Circuit Court of Appeals concluded therefore, that the situation in this case is entirely different from that which brought forth the Commission's report and order cited by petitioner in its brief.

Petitioner relies upon *Interstate Commerce Commission v. Reichmann* (145 Fed. 235). That case did not involve, nor is it so contended by petitioner, the effect of an agreement on the part of a car owner to pay to a lessee or user, any portion of the mileage allowance earned according to the published tariffs, for the use of railroad cars. Nor does the opinion condemn the payment by the car owner of any portion of the mileage allowance except in the particular circumstances shown to exist in that case. Reichmann was the vice president of a car company owning a large number of cars used by the railroads in the transportation of livestock over their several lines. The Interstate Commerce Commission was authorized by Section 2 of the Elkins Act to investigate all charges of abuses of the Act, and in that behalf to call and examine witnesses. Under this authority, the Commission, having called Reichmann, asked what part of the mileage received by his company from the rail-

roads *for the use of its cars by said railroads was paid to individual shippers.* Reichmann refused to answer, and the question referred to the Court by the Commission was as to the right of the Commission to insist upon the answer. At the outset of his opinion, the District Court said (p. 237):

> "In considering the question, I shall assume, as counsel did at the argument, that an answer by the witness would have disclosed that payments of money were made by the Street Company to shippers of freight, and with a view to thereby inducing such shippers to demand that carriers furnish them with Street's cars for the transportation of their future shipments."

In discussing the authority of the Commission to insist upon the answer to the particular question, the Court reviewed at length the history and purpose of the Interstate Commerce Act, including the Elkins Act. But the comments of the Court could not change the issue before it, or extend the decision beyond the facts of the case. As stated by the Court, the facts were that the car company *rented its cars to the railroads.* The railroads furnished them, as it did other cars owned by them, to shippers. To induce shippers to use its cars as distinguished from the cars owned by the railroads or cars owned by other companies, Reichmann's car company paid to the shippers, who would demand and use its cars, a portion of the mileage or rental received by his company from the railroad carriers. The feature of that case which made the limitations of the Interstate Commerce Act applicable, and the feature that distinguishes that case

from this, was the fact that to induce the shipper to demand from the railroad carrier freight cars owned by his company, Reichmann paid the shipper a portion of the money received from the railroad carriers. As pointed out by the Court the shipper paid the freight but received back a portion of the money so paid in consideration of his use of the particular cars, which the carriers had rented from Reichmann's company. As before stated, petitioner does not in this case claim, nor did the trial Court find, that the *agreement* sued upon was illegal, and the opinion in the Reichmann case has no application here because the facts were entirely different. Furthermore, at the date of that decision, the Hepburn Amendment had not been enacted, and was not incorporated into the Interstate Commerce Act until 1906. Carriers are expressly permitted to allow shippers compensation for furnishing tank cars and other facilities.

The third case relied upon by petitioner is *Spencer Kellogg and Sons v. U. S.*, 20 Fed. (2d) 459. The case involved the construction of the Elkins Act, and as said by the Court:

> "The test to be applied in determining whether the Act is violated is whether the terms of the statute include the acts committed. Whether the person committing the act is a shipper or carrier is not determinative." (p. 461.)

Application of the test, as stated, to the facts of the present case, clearly shows that the payment by petitioner of the amounts collected by it as mileage allowances for respondent's account cannot be coordinated

with any prohibition contained in the act. Spencer Kellogg and Sons, in the use of its grain elevator, acted as one of the media engaged in the interstate transportation of grain. This is clear from the following language of the Court which we quote from page 461 of the opinion:

> "This plaintiff in error, in using its elevator for transportation, performed transportation services and effected the through movement of interstate shipments of grain. It was engaged in interstate traffic."

The published railroad tariffs provided a through freight rate for the transportation of grain from the point of original shipment to the Atlantic Seaboard. This through rate covered an allowance of 1¢ per bushel to the elevator company for unloading the grain from the lake steamers, moving it through the elevator and loading it upon railroad cars at Buffalo. To induce shippers to route their grain so that it would pass through the Kellogg elevators in its interstate transportation the Kellogg corporation allowed a rebate of ½¢ per bushel and arranged the payment thereof through a broker in New York. While therefore the shipper paid the full freight rate he received back from Spencer Kellogg and Sons, one of the transporting carriers, one-half of the sum paid to the elevator company for such transportation services. This was clearly a rebate by an interstate carrier and the Court sustained the conviction on that ground. In that connection, we quote the following from the closing paragraph of the Court's opinion (p. 462):

> "The penalty is imposed here, not because it was acting for the carrier, but because it performed a service of transportation, and gave a rebate to its shipper or consignee from the compensation received for that part which it performed."

This excerpt from the opinion clearly answers the argument which is advanced in petitioner's brief that the cited case held that the Elkins Act was not limited in its application to shippers and carriers. The Court expressly held that the service rendered by Spencer Kellogg and Sons Company was one step in the actual transportation of the grain and the company was condemned solely on that ground.

C. The reference by the Circuit Court of Appeals to car mileage tariffs.

On pages 30-32 of its brief, petitioner criticizes certain references in the opinion of the Circuit Court of Appeals to rail carriers' car mileage tariffs. These criticisms are unjustified. The record shows that during the period covered by this suit there were in existence certain regulations found in the railroad carriers' car mileage tariff wherein it was provided that mileage earnings would be paid to the car owner, or to the person that had acquired the cars and had fulfilled certain other requirements set forth in the regulations. (R. 191-196.) The record does not reveal that there was any other tariff provision or any regulation or order of the I. C. C. prohibiting payment by railroads of mileage compensation directly to the supplier of the facilities. It is, of course, clear from the cases we have cited above and from the provisions

of the Interstate Commerce Act, that a shipper-supplier like El Dorado Company is entitled to compensation for furnishing facilities to the railroad.

U. S. v. Baltimore & Ohio Railroad (1913), 231 U. S. 274, 58 L. Ed. 218;

Interstate Commerce Commission v. Diffenbaugh (1911), 222 U. S. 42, 56 L. Ed. 83;

Union Pacific v. Updike Grain Company (1911), 222 U. S. 215, 56 L. Ed. 171;

American Trucking Assns. Inc. v. U. S. et al. (D. C. Dist. of Co. 1936), 17 Fed. Sup. 655;

49 *U. S. C. A.* Sec. 1 (14);

49 *U. S. C. A.* Sec. 15 (13).

Thus those parts of the opinion of the Circuit Court of Appeals referred to on pages 31-32 of petitioner's brief are entirely justified.

Petitioner here for the first time (Brief p. 31) refers to a tariff regulation effective April 1, 1935, which provides that mileage payments should not be made to the lessee of tank cars. This provision, of course, does not affect any part of the sum sued for by respondent in the Court below. The sum sued for by respondent in the Court below includes mileage earnings which were due and should have been paid by the car corporation to El Dorado Company prior to May 31, 1935. (R. 2, 6.) Prior to July 1934, when the car corporation admittedly breached its contract with the El Dorado Company (Petition p. 6), the customary method of adjustment under the contract between the parties resulted in the payment to El Dorado Company by the car corporation of excess

mileage earnings sometime during the second month after mileage was actually earned by the tank cars. (R. 182.) Thus the tariff regulations refefred to on page 31 of the petitioner's brief do not in any manner affect the sum involved in this suit and the parties have never so considered it prior to petitioner's brief.

D. The agency theory.

It was clear to the Circuit Court of Appeals that the contract and method of dealing as between the car corporation and the El Dorado Company resulted in making the car corporation an agent for the collection of car mileage revenue earned by the tank cars furnished by El Dorado Company to the railroad. (R. 305, 332.)

As indicated above, the law expressly contemplates that a *shipper-supplier* of tank cars to railroads should be compensated for furnishing them. And there is nothing in the railroad tariffs or rules of the I. C. C. preventing such compensation by the rail carrier to the *shipper-supplier* directly. There is also nothing in the record to show that the agency contract was entered into as a device to effect a rebate or discrimination. Thus there is clear justification for the recognition by the Circuit Court of Appeals of the existence of an agency to collect the lawful compensation for respondent, a supplier of transportation facilities to railroads.

II.

PETITIONER DID NOT PLEAD NOR PROVE THE ILLEGALITY OF PAYING TO RESPONDENT MILEAGE EARNINGS IN EXCESS OF "RENTAL".

In its opinion below, the Circuit Court of Appeals set forth as one ground for its decision that no question of a rebate or discrimination could arise until the car corporation had established that *the costs and expenses of the El Dorado Company in supplying the cars to the carriers are less than the mileage earnings of the cars.* (R. 308.)

There can be no question of the validity of the point made by the Circuit Court of Appeals. The whole basis of petitioner's defense to the suit of the District Court was that if it were to pay over excess mileage earnings to the El Dorado Company El Dorado Company would realize a "profit" as a supplier of tank cars to the railroad and that such a "profit" to it as a supplier would constitute a rebate to it as a shipper of commodities. Petitioner has always claimed that the receipt by respondent of any mileage compensation in excess of the single item of rental would constitute a "profit". We assume that the petitioner means a net profit. It was concluded both in the answer of the petitioner in the District Court and in the conclusions of law in the District Court that the receipt by El Dorado Company of mileage compensation in excess of this single item of rental would constitute a rebate and discrimination in violation of the Elkins Act. (R. 18, 35.)

Petitioner claims that the record reveals no cost or expense other than car rental incurred by El

Dorado Company in connection with the use and furnishing of the tank cars. Petitioner further claims that neither party raised any issue as to additional costs and that the Circuit Court of Appeals was not justified in holding that petitioner did not prove in the trial Court that the item of rental constituted the sole cost to the El Dorado Company.

The fallacy of petitioner's argument and the correctness of the Court's opinion are immediately apparent. The contract with the car corporation was proved (R. 46), respondent's full performance thereof was admitted (R. 13), and the car corporation admittedly failed to perform under the contract. A *prima facie* case for the recovery of the stipulated sum of $18,532.78 was made out. The defense of the petitioner herein was that performance by it was illegal and would be in violation of the provisions of the Elkins Act.

It is a well recognized principle of law that the burden of meeting and proving illegality is upon the party asserting it.

22 *Corpus Juris* 147.

To support its conclusion that the El Dorado Company as a shipper would receive a rebate if the car company were to pay over such excess mileage to it, the car company merely plead in its answer (R. 18), that the payment by it of mileage earnings in excess of the "car hire or rental reserved" in the contract would constitute an illegal rebate, and the trial Court so concluded. (R. 35.) The record also shows that

petitioner made no allegation in its answer, made no proof at the trial, and that the trial Court made no finding of fact either that rental constituted the sole item of cost and expense to respondent as a supplier of tank cars, or that respondent had no additional cost or expenses, or that any part or all of the mileage earnings sued for by respondent as supplier would constitute a "profit" to it, or that a "profit" to it as supplier would constitute a rebate to it as a shipper of commodities.

Petitioner seeks to remedy its failure to prove illegality at the trial by now asserting that *respondent* should have raised the torch and *proven the legality* of performance by petitioner under the contract. There is nothing in the record to indicate that petitioner could not have made proof of illegality.

The record shows that petitioner is the owner of a large number of cars and was engaged in the business of leasing them throughout the country. (R. 173-176.) There was evidence that about 400 cars at one time were under lease in California (R. 175) and that several other shippers of vegetable oils obtained cars by lease from petitioner. (R. 175, 176.) Petitioner's answer in the trial Court sets forth the contract with respondent wherein obligations of the respondent in respect to the leased cars were specifically referred to. (R. 23-26.) The record clearly shows that petitioner could readily and adequately have given evidence to negative the existence of other costs or obligations if there were actually no other costs except the obligation to pay rent.

Petitioner also urges that there is nothing in the record to show that any additional cost or obligation existed. This is clearly error. The *contract itself* which was attached to petitioner's answer expressly imposed upon respondent El Dorado Company the obligation to return the leased cars "in the same condition in which they were furnished excepting for ordinary wear and tear" (R. 24); petitioner relieved itself from any liability for damage or loss of the whole or any part of the shipment of any of the leased cars or for any loss from injuries to persons or property; respondent agreed to protect and save petitioner harmless from any such loss or damage; liability for damage to the cars while on privately owned tracks was imposed upon respondent; and respondent was required to replace removable tank parts. (R. 25.) The contract also shows that rental payments were required to be paid on the first of each month in advance (R. 23) and thus respondent as supplier had that part of its investment tied up until it could supply the tank cars to the railroads and thereby earn mileage. In addition to these clearly indicated costs and obligations of respondent in connection with the use of the leased tank cars, the Circuit Court of Appeals did not close its eyes to other costs and obligations which are matters of common knowledge (R. 308-311), but which petitioner objected to in its brief. (p. 36.)

The record and the opinion of the Circuit Court of Appeals clearly show that costs and obligations in

addition to rental actually did exist, and as petitioner did not prove that the whole amount would constitute a "profit" to respondent, its defense falls.

III.

PERFORMANCE OF THE CONTRACT BEING ENFORCEABLE, ENFORCEMENT OF THE ELKINS ACT IS NOT INVOLVED.

Petitioner's final argument is that the enforcement of a contract found to be in conflict with the Elkins Act must yield to the enforcement of the Elkins Act. We believe we have in effect already answered this argument of petitioner. We have shown that the decision of the Circuit Court of Appeals that performance under the contract would not result in violation of the Elkins Act is correct and is supported by the authorities, and by the undisputed evidence adduced at the trial. Therefore there is nothing to sustain a refusal by petitioner to perform under the contract, and respondent is entitled to judgment for the full amount admittedly withheld from it by petitioner.

CONCLUSION.

From the record of this litigation and from the decision of the Circuit Court of Appeals it is clear that petitioner, without questioning the lawfulness of payment of mileage earnings to it, is merely seeking to escape its obligations to respondent to pay over

mileage earnings, which was one of the considerations of the lease contract. Petitioner's excuse for breaking its contract was claimed to be the advice of counsel as to the applicability of a report of the Interstate Commerce Commission, which concerned an entirely different matter. The decision of the Circuit Court of Appeals against petitioner is directly in line with decisions of this Court, and is not in conflict with any cited authorities.

We submit that petitioner has not shown or even indicated any substantial reason for this Honorable Court to exercise its discretion and grant to petitioner a writ of certiorari, and therefore the petition should be denied.

Dated, San Francisco, California,
July 26, 1939.

Respectfully submitted,
W. F. WILLIAMSON,
Attorney for Respondent.

WILLIAMSON & WALLACE,
Of Counsel.

(Appendix Follows.)

Appendix.

(T. 49 U. S. C. A.):

Section 41. Liability of corporation carriers and agents; offenses and penalties.—(1) Liability of corporation common carriers; offenses; penalties; jurisdiction. Anything done or omitted to be done by a corporation common carrier, subject to the preceding chapter, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said chapter or by sections 41, 42, or 43, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said chapter to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign com-

merce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: Provided, That any person, or any officer or director of any corporation subject to the provisions of Sections 41, 42, or 43, or of the preceding chapter, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the Court. Every violation of this section shall be prosecuted in any Court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

(2) Liabilities for acts of agents; departture from published rates. In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carriers files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the preceding chapter, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under sections 41, 42, or 43, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section.

(3) Receiving rebates; additional penalty and recovery thereof. Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of sections 41, 42, or 43, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable considera-

tion as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in said sections, shall in addition to any penalty provided by said sections forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial Court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any Court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money or three times the total value of such consideration, so received or accepted, or both, as the case may be. (Feb. 19, 1903, c. 708, Sec. 1, 32 Stat. 847; June 29, 1906, c. 3591, Sec. 2, 34 Stat. 587.)

(T. 49 U. S. C. A.):

Section 42. Parties included in proceedings to enforce law. In any proceeding for the enforcement of the provisions of the statutes relating to interstate

commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any District Court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers. (Feb. 19, 1903, c. 708, Sec. 2, 32 Stat. 848; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.)

(T. 49 U. S. C. A.):

Section 43. Proceedings in equity to enforce tariffs, etc.; district attorneys; damages; witnesses; precedence. Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the District Court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the Court summarily to inquire

into the circumstances, upon such notice and in such manner as the Court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto, as the Court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said Court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by sections 41, 42, or 43 shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by the preceding chapter. And in proceedings under said sections and the preceding chapter the said Courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the

criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: Provided, That the provisions of sections 44 and 45 shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission. (Feb. 19, 1903, c. 708, Sec. 3, 32 Stat. 848; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167.)

(14) Establishment by commission of rules, etc., as to car service. The commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this chapter, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices. (Feb. 4, 1887, c. 104, Sec. 1, 24 Stat. 379; June 29, 1906, c. 3591, Sec. 1, 34 Stat. 584; Apr. 13, 1908, c. 143, 35 Stat. 60; June 18, 1910, c. 309, Sec. 7, 36 Stat. 544; May 29, 1917, c. 23, 40 Stat. 101; and Feb. 28, 1920, c. 91, Secs. 400-403, 41 Stats. 474-478.)

(T. 49 U. S. C. A., Section 15):

(13) Allowance for service or facilities furnished by shipper. If the owner of property transported

under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section. (Feb. 4, 1887, c. 104, Sec. 15, 24 Stat. 384; June 20, 1906, c. 3591, Sec. 4, 34 Stat. 589; June 18, 1910, c. 309, Sec. 12, 36 Stat. 553; and Feb. 28, 1920, c. 91, Sec. 421, 41 Stat. 488.)